STATE OF MICHIGAN

IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant

Supreme Court
No. 130245

Court of Appeals
No. 256066

Circuit Court
No. 2003-193910-FC

-vs-

RANDY R. SMITH,

Defendant-Appellee.
_____/

130245 / Supp by Pros

SUPPLEMENTAL BRIEF IN SUPPORT
OF APPLICATION FOR LEAVE TO APPEAL

PROOF OF SERVICE

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TABLE OF CONTENTS

PAGE

INDEX TO AUTHORITIES CITED

CASES PAGE

STATUTES

OTHER AUTHORITIES

RULES

STATEMENT OF BASIS OF JURISDICTION

This Court entered an order (Appendix A) on March 31 2006, directing the Clerk of this Court to schedule oral argument on the People-Appellant's application for leave to appeal from an unpublished opinion of the Court of Appeals (Appendix B) entered on December 22, 2005. The opinion of the Court of Appeals reversed defendant's conviction for second degree murder in the Oakland County Circuit Court. (Appendix B).

The order of this Court directed the parties to file supplemental briefs addressing:

> We direct the Clerk to schedule oral arguments on whether to grant the application or take other peremptory action. MCR 7.302(G)(1). The parties are directed to file supplemental briefs within 56 days of the date of this order addressing: (1) whether statutory involuntary manslaughter, MCL 750,329, is a necessarily included lesser offense of murder; and, if so (2) whether a rational view of the evidence in this case supports a conviction of statutory involuntary manslaughter; and, if so (3) whether the Oakland County Circuit Court's failure to give a jury instruction on statutory involuntary manslaughter was harmless error.
> *People v Randy R. Smith*, 474 Mich 1100; 711 NW2d 83 (2006).

STATEMENT OF QUESTIONS PRESENTED

I. THIS COURT IN PEOPLE V HEFLIN ESTABLISHED THAT STATUTORY MANSLAUGHTER IS NOT A NECESSARILY LESSER-INCLUDED OFFENSE OF MURDER. THE ELEMENTS OF STATUTORY MANSLAUGHTER FOUND IN MCL 750.329 ARE NOT COMPLETELY SUBSUMED IN THE GREATER OFFENSE OF SECOND-DEGREE MURDER. WHETHER THE TRIAL COURT CLEARLY ERRED BY REFUSING TO INSTRUCT THE JURY ON THE COGNATE OFFENSE OF STATUTORY MANSLAUGHTER?

The Court of Appeals answered this question "Yes."

Defendant contends the answer should be, "Yes."

The People contend the answer is, "No."

II. RETREATING FROM THE ELEMENTAL TEST OF CORNELL AND APPLYING A FACT DRIVEN TEST, THE DECISION NOT TO INSTRUCT ON STATUTORY MANSLAUGHTER WAS HARMLESS. THE JURY REJECTED THE INTERMEDIATE OFFENSE OF COMMON LAW MANSLAUGHTER, FINDING DEFENDANT GUILTY OF SECOND-DEGREE MURDER. WHETHER DEFENDANT IS ENTITLED TO A NEW TRIAL BECAUSE OF THE FAILURE TO INSTRUCT ON STATUTORY INVOLUNTARY MANSLAUGHTER?

The Court of Appeals answered this question "Yes."

Defendant contends the answer should be, "Yes."

The People contend the answer is, "No."

STATEMENT OF FACTS

Defendant, Randy R. Smith, was charged with second-degree murder contrary to MCL 750.317, and with possession of a firearm in the commission of a felony contrary to MCL 750. 227b. Following a jury trial conducted by the Honorable Edward Sosnick, defendant was convicted as charged. On May 5 2004, Judge Sosnick sentenced defendant within the statutory guidelines to a term of 31 years to 50 years on the second-degree murder conviction, and a consecutive two years with credit for 143 days served on the felony firearm conviction. Defendant appealed as of right, challenging the admission of 404(b) evidence, the jury instruction, the sufficiency of the evidence, the prosecutor's closing argument and the application of statutory guidelines. The Court of Appeals, in an unpublished per curiam opinion, reversed the conviction, determining that the trial court properly instructed the jury on the charged offense of second degree murder, and the lesser included offense of common law manslaughter, but erred by declining to instruct on the offense of statutory manslaughter. The panel stated that

> ***Mendoza* appears to contradict *Cornell*; however, we are bound by these rulings of the Supreme Court and are not permitted to question their apparent inconsistency.**

The panel was silent on *Cornell's* instruction that harmless error analysis is applicable to claims of instructional error. *People v Cornell* 466 Mich 335, 361-362; 646 NW2d 127 (2002).

Robert Moomaw testified to the identity of the victim as his 16-year-old daughter, Ashleigh Moomaw, whose date of birth was December 11, 1987.

Officer Michael Emmi from the Hazel Park Police Department was dispatched to 135 West Madge on December 7, 2003 a little after 1:00 a.m. on a report of a person shot in the head. (T-II, 29). The doors to the house were locked, and he could not see into the window. Emmi

entered through the front door and found a young female on the floor with what appeared to him as a bullet hole in her head. Emmi could not find a pulse and the victim was not breathing. (T-II, 41).

The on duty evidence technician for Hazel Park, Officer Vroman, was dispatched to the scene. After the house was secured, Vroman began gathering evidence. He recovered a bag with marijuana from a coffee table and a spent shell casing from between the couch cushions. (T-II, 59). Vroman recovered live ammunition from the entertainment center in a CD case. There were 10 live .22 caliber live rounds. (T-II, 62). In the northwest bedroom closet were 16 live .25 caliber rounds in a box. (T-II, 66). Under the bed was a black gun case. (T-II, 69). In a kitchen drawer more .22 caliber rounds were discovered. (T-II, 71). The trashcan had a spent shell casing from a .22. (T-II, 73). Under the lid of the barbecue were two large bags of marijuana. (T-II, 75). Also in the backyard was a .22 caliber pistol. (T-II, 76). Vroman described the .22 handgun as a Browning .22 caliber long rifle. The description described the type of ammunition. The gun was unloaded. (T-II, 78).

Vroman was later sent to 89 West Madge where he recovered a .25 caliber semi-automatic pistol. Next to the gun were a hundred-dollar bill and a ten-dollar bill, and a paper towel. The gun was loaded with a magazine containing four rounds with one in the chamber, the safety was off. (T-II, 84-87). 89 West Madge is five houses to the east of the crime scene. (T-II, 98).

Earlier that fateful evening, Darrin Teed and his 19 year-old girlfriend arrived at 135 West Madge to buy ecstasy from Randy Smith. In the house were Blaine Brabant, Jeremy Johnson, and defendant Smith. (T-II, 110). Brabant showed Teed a .22 caliber pistol that was in a kitchen drawer. (T-II, 112). A short time later two females arrived at the house, Ashleigh

Moomaw and Jamie Crawford. (T-II, 113). While calls were made to run down the drugs, defendant took out a gun and showed it to Teed. Defendant was sitting in the middle of the couch when he pulled out the gun. He (defendant) described the gun to Teed as a .25 caliber that held six shots in the clip and one in the chamber. Defendant pulled out the magazine and showed Teed that the gun was loaded. (T-II, 114-116). Brabant and Johnson asked the victim if they could borrow her car to obtain drugs for Teed. Teed then left with Brabant and Johnson, while the two females stayed behind with defendant at the house. (T-II, 118,121).

Jamie Crawford, a 16-year-old from Hazel Park, was a best friend to Ashleigh Moomaw. On December 6, 2003 she talked with Ashleigh about their plans for the evening. It was determined that Ashleigh was going to pick up Crawford around 10:00p.m. after she got home from work. Together they went to 135 West Madge to retrieve a pair of shoes that Ashleigh had left at defendant's house. When they pulled up, the girls recognized a car belonging to Christina Lauria parked out front. Ashleigh decided not to go to the door because she thought that defendant was up north and not home. Crawford went to the front door and knocked. No one answered the door, but she could hear that defendant was in the house. Crawford returned to Ashleigh's car, and the girls drove back to Ashleigh's house in the 9 Mile and Schoenherr area. (T-II, 134).

Back at Ashleigh's house, the girls received a call from defendant asking them to come over to his house. Crawford helped Ashleigh do her hair and makeup before they returned to defendant's around 1:00 a.m. (T-II, 138). Defendant and three other males were at 135 West Madge when Ashleigh and Crawford arrived. One, Jeremy Johnson, asked Ashleigh to use her car. She gave him her keys. (T-II, 140-142). Both Ashleigh and Crawford had a drink of liquor that they had brought to the house.

Crawford noted that there were dogs in the house, a couple of pit bull puppies, and another dog in the back yard. Defendant tried to force the puppies to fight, but Ashleigh asked him to stop, so defendant put the puppies in another room. Ashleigh and defendant then went into the living room and started talking. Ashleigh was sitting on the arm of the couch, while defendant was on the couch next to Ashleigh. (T-II, 147). Crawford was in the kitchen and could hear low talking in the living room, and then she heard defendant saying, "say I won't do it." (T-II, 149). Crawford looked over the half wall separating the two rooms and saw a side view of a gun pointed in Ashleigh's direction. (T-II, 150). Ashleigh told defendant that he was gay, meaning that he was stupid. The gun was moved away from Ashleigh, before defendant then pointed the gun at Ashleigh's head. (T-II, 154,156). Defendant kept saying "say I won't do it," Ashleigh told defendant not to be stupid, but defendant then pulled the trigger. (T-II, 157). The sound of the shot pierced the ears of Crawford, as Ashleigh hit the floor. (T-II, 159).

Crawford observed that defendant was sitting while Ashleigh was on the floor not moving. The gun was in defendant's lap, and his hands were still on the gun. (T-II, 161). Ashleigh was on the ground, motionless, with blood underneath her head. (T-II, 162). Defendant then told Crawford not to tell anyone what had happened, to say that Ashleigh had shot herself. Crawford was afraid of defendant so she agreed to his story. (T-II, 164). Crawford asked defendant to use his cell phone to call for help and a ride. Defendant lied to her and told Crawford that he did not have his phone on him. Crawford had seen Ashleigh use the phone just minutes earlier. There was no landline in the house. (T-II, 166). Crawford eventually agreed to leave the house with defendant. Before he left the house, defendant put on a sweatshirt and took a bag of marijuana from the house. (T-II, 167). Crawford testified that after the shooting, defendant never checked on Ashleigh or gave her any assistance. (T-II, 169). Eventually,

Crawford made her way to a friend's house in Ferndale. At the home of Anna Rankins, Crawford called her mother and then called 911 to report the shooting. (T-II, 174).

On cross-examination, Crawford testified that Ashleigh had told her that this was not the first time that defendant had pointed a gun at her. In fact, the defendant had previously threatened others with a gun, (at this point the assistant prosecutor objected to any questions about defendant's previous use of a gun)[1]. Following a short redirect, the witness was excused.

Sergeant Tim Ketvirtis, a firearm expert with the Michigan State police, examined the .25 caliber recovered from a yard five houses down from the defendant's house. Ketvirtis described the gun as a .25 caliber semi-automatic pistol manufactured by Raven, model MP25. As part of his duties he inspected and test fired the gun. (T-II, 213). The gun was working, as was the gun's safety that prevented the gun from firing when properly engaged. The gun did not accidentally fire when purposely dropped by Ketvirtis. (T-II, 219-229). Other tests demonstrated that the gun would not fire by accident. When laboratory weights were applied to the trigger, the gun did not fire until 7 pounds of pressure were applied to the trigger. (T-II, 222). It was Ketvirtis' opinion that the gun fired as designed by the manufacturer.

A comparison of a test shot with the bullet recovered from the victim's head revealed that the bullet that killed Ashleigh Moomaw was fired from the recovered firearm. (T-II, 234). The cartridge recovered from the couch in defendant's house could not be excluded as having come from the .25 caliber pistol. (T-II, 235). The fired cartridge was the same type as the ammunition that was recovered from the gun. (T-II, 236).

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[1] This is somewhat confusing, the defense admitted prior uncharged misconduct by the defendant, and the People who had previously made a motion to admit such evidence objected to that evidence.

On December 6 2003, Christina Lauria was dating defendant and had known him since she was in the seventh grade. She dropped defendant off at 135 West Madge in Hazel Park in the afternoon of December 6, 2003. She returned later that evening, but did not go into the house when she saw that two other girls were at the house that she did not get along with. She left with her friend Megan. (T-II, 246). She returned to defendant's house after she purchased alcohol. (T-II, 248). Once at defendant's house she and the defendant drank some alcohol and smoked marijuana. (T-II, 250). Defendant showed her a gun and later took Lauria into a bedroom. Inside the bedroom defendant put the gun under the bed while he and Lauria were kissing. (T-II, 251). Megan came to the bedroom door and wanted to leave because she was afraid of two other girls that were coming over to the house. These girls were identified as Michelle Gomez and Angela Trout. (T-II, 252).

The defense asked if defendant ever pointed the gun he had at Lauria. She indicated that defendant had pointed the gun at her and stated to her "say I won't." (T-II, 254-255).

Doctor Bernadino Pacris, the deputy medical examiner for Oakland County, performed the autopsy on Ashleigh Moomaw. He was qualified as an expert in forensic pathology and in determining the cause and manner of death. (T-III, 7). Ashleigh Moomaw had suffered a gunshot wound to the head just above the right eyebrow. There was no exit wound caused by the small caliber bullet that lodged in her brain. The trajectory of the bullet was front to back, right to left and slightly upward. (T-III, 11-15). The cause of death was the gunshot wound to the head, and the manner of death was homicide. (T-III, 17). Pacris opined that the victim did not die immediately, but did die within a few minutes of the gunshot wound to her head. (T-III, 18).

Nathan Pellow was a 21-year old that knew the defendant, but was not friends with him. On November 2 2003, he went to pick up his sister at a party on Spraig in Hazel Park. Outside

the house he had a confrontation with defendant. They grabbed each other's shirts, before Pellow threatened to beat up defendant. Pellow then pushed defendant away. (T-III, 23, 30). As Pellow was returning to the vehicle that he had parked on a side street, he heard defendant yell, "you want to fuck with me motherfucker", and saw defendant fire off three shots from a handgun. Defendant was on the other side of the street, and the shots were aimed into the air. (T-III, 26-29). Judge Sosnick then gave the jury a cautionary instruction on the use of the evidence and testimony provided by Pellow.

The People also presented the testimony of Lieutenant Michael Kolp of the Hazel Park Police Department, who gave the details of defendant's arrest. The jury was then taken from the courtroom, the defense then made a record with regard to three witnesses, Rod Vanloovin, Blaine Brabant, and Jeremy Johnson. Each of these witnesses had an attorney appointed, and each indicated that after speaking with the attorney they would assert their Fifth Amendment right not to incriminate themselves. (T-III, 45-60). The jury was then returned to the courtroom and the People rested. The defendant did not testify.

Following closing arguments, Judge Sosnick instructed the jury, including an instruction on involuntary manslaughter. (T-III, 106-107). The jury deliberated for an hour before finding the defendant guilty of second-degree murder and felony firearm. (T-III, 113).

Sentencing took place on May 5, 2004. The defense challenged the scoring of the guidelines. On offense variable 9, Judge Sosnick agreed with the defense challenge and scored this variable zero. (ST, 5). On offense variable 13, Judge Sosnick found that defendant's convictions were part of a pattern of criminal behavior and scored this variable 25 points. (ST, 7). Judge Sosnick did not change the scoring on offense variable 19. The guideline range remained at 225 months to 375 months, in cell C3. Judge Sosnick imposed a sentence within the

statutory guidelines of 31 to 50 years on the second-degree murder conviction. Consecutive to this sentence, defendant received a 2-year term on his felony firearm conviction with credit for 143 days served.

Defendant appealed as of right. The Court of Appeals reversed, finding that statutory manslaughter was a necessarily lesser-included offense of all charges of murder, and reversed defendant's conviction without consideration of harmless error. Additional pertinent facts may be discussed in the body of the argument section, *infra*, to the extent necessary to fully advise this Honorable Court as to the issues raised by the People.

ARGUMENT

I. THIS COURT IN PEOPLE V HEFLIN ESTABLISHED THAT STATUTORY MANSLAUGHTER IS NOT A NECESSARILY LESSER-INCLUDED OFFENSE OF MURDER. THE ELEMENTS OF STATUTORY MANSLAUGHTER FOUND IN MCL 750.329 ARE NOT COMPLETELY SUBSUMED IN THE GREATER OFFENSE OF SECOND-DEGREE MURDER.

Standard of Review

Whether statutory manslaughter, MCL 750.329 is a necessarily lesser-included offense of murder within the meaning of MCL 768.32(1) is a question of law that a court reviews de novo. *People v Mendoza*, 468 Mich 527, 531; 664 NW2d 685 (2003).

Analysis

MCL 768.32(1) states:

> Except as provided in subsection (2), upon an indictment for an offense, consisting of different degrees, as prescribed in this chapter, the jury, or the judge in a trial without a jury, may find the accused not guilty of the offense in the degree charged in the indictment and may find the accused person guilty of a degree of the offense inferior to that charged in the indictment, or of an attempt to commit that offense.

MCL 750.316 and MCL 750.317, which address first and second degree murder, do not purport to define the crime of "murder", but only graduate the punishment for the common law offense. *People v Aaron*, 409 Mich 672, 719; 299 NW2d 304 (1980).[2] The crime of manslaughter is defined by

[2] First degree murder in Michigan, MCL 750.316, is a common law or second-degree murder plus an element, namely premeditation or [attempted] perpetration of a listed felony. *People v Carter*, 395 Mich 434, 437-438; 236 NW2d 500 (1975); see also *People v Allen*, 390 Mich 383; 212 NW2d 21 (1973) [adopting the dissent of then-Judge Levin reported at 39 Mich App 483 (1972), see p 501-502 of then Judge Levin's opinion].

the common law. At common law, manslaughter was considered a lesser-included offense of murder.

In *Mendoza, Supra* at 540 this Court noted that a necessarily lesser-included offense is an offense whose elements are completely subsumed in the greater offense. The Court held:

> [E]lements of voluntary and involuntary manslaughter are included in the elements of murder. Thus, both forms of manslaughter are necessarily included lesser offenses of murder. Because voluntary and involuntary manslaughter are necessarily included lesser offenses, they are also "inferior" offenses within the scope of MCL 768.32. Consequently, when a defendant is charged with murder, an instruction for voluntary and involuntary manslaughter must be given if supported by a rational view of the evidence.

The *Mendoza* Court went on to note that; "We further disagree with the conclusion of the Court of Appeals that an instruction for common-law involuntary manslaughter was premised on defendant's theory of the case." The opinion does not necessitate a reading between the lines to distinguish between common-law manslaughter and statutory manslaughter, it is spelled out in the opinion for all to read[3].

In *People v Heflin*, 434 Mich 482; 456 NW2d 10 (1990), this Court reinstated defendant's second degree murder conviction after the Court of Appeals had reversed because of a failure to instruct the jury on statutory involuntary manslaughter. Justice Levin started his dissent by stating, "We all agree that statutory involuntary manslaughter is a cognate offense of murder." *Heflin, Supra* at 530. The majority was even more direct stating that "Today, we remove any doubt and conclude that statutory involuntary manslaughter is a cognate lesser included offense of murder." *Heflin, Supra* at 498.

[3] The Court of Appeals opinion in *Mendoza*, No 220272, noted that defendant was not entitled to an instruction on statutory manslaughter under MCL 750.329. Copy attached as Appendix C.

MCL 750.329[4] provides:

> Any person who shall wound, main or injure any person by the discharge of any firearm, pointed or aimed, intentionally but without malice, at any such person, shall, if death ensue from such wounding, maiming or injury, be deemed guilty of the crime of manslaughter.

In the present matter, the defendant was charged with second-degree murder. On his request, the jury was instructed on the necessarily lesser-included offense of involuntary manslaughter. MCL 750.321. (T-III, 102-103). However, defendant also sought an instruction on the cognate offense of statutory manslaughter, entitled "Death, firearm pointed intentionally, but without malice". Specifically, defendant wanted the jury instructed on MCL 750.329. Judge Sosnick declined to instruct on this cognate offense. This Court in *Mendoza* was silent on whether statutory manslaughter was a necessarily included offense. (See footnote 7 in *Mendoza*).

The Court of Appeals does not distinguish between common-law manslaughter and statutory manslaughter, instead offering the broad conclusion that this Court "Reversed long-standing precedent and determined that manslaughter, both voluntary and involuntary, is a necessarily included, rather than cognate, lesser offense of murder." *Smith* slip opinion at p5.

For an offense to be necessarily lesser included, an offense must require the jury to find a disputed factual element which is not required for conviction of the lesser-included offense. Second degree murder does not require the use of a firearm or the discharge of the firearm aimed or pointed at another person. In *Cornell,* this Court recognized that MCL 768.32 only permits consideration of necessarily included lesser offenses, not cognate offenses. MCL 768.32 forecloses consideration of cognate lesser offense which are related or of the same "class or

[4] MCL 750.322, and MCL 750.323 are also forms of statutory manslaughter.

category" as the greater offenses and contain some elements not found in the greater offense. *Id.* at 355. Instead, an inferior-offense instruction is appropriate only if the lesser offense is necessarily included in the greater offense, meaning, **all the elements of the lesser offense are included in the greater offense** and are completely subsumed in the greater offense. *Mendoza, Supra,* at 533, 540. See also *People v Silver*, 466 Mich 386, 392; 646 NW2d 150 (2002) (breaking and entering without permission is a necessarily included lesser offense of first-degree home invasion because it is impossible to commit first-degree home invasion without first committing a breaking and entering without permission); *People v Lowery*, 258 Mich App 167, 173-174; 673 NW2d 107 (2003) (requested jury instruction on reckless discharge of a firearm causing injury is not a necessarily included offense of assault with intent to murder because a person may commit the latter without committing the former); *People v Alter*, 255 Mich App 194, 199-200; 659 NW2d 667 (2003) (sexual intercourse under pretext of medical treatment is not a necessarily included lesser offense of first-degree criminal sexual conduct).

Defendant and the Court of Appeals fail to recognize that there is a distinction between statutory manslaughter and second-degree murder, besides the degree of mens rea. Second-degree murder is common-law murder and a general intent crime. *People v Goecke*, 457 Mich 442, 463-464; 579 NW2d 868 (1998); *People v Bailey*, 451 Mich 657, 669; 549 NW2d 325 (1996). Second-degree murder is the unjustified and unexcused killing of a human being with malice. *People v Neal*, 201 Mich App 650, 654; 506 NW2d 618 (1993). Malice is to be determined from all the facts and circumstances of the crime. *People v Reeves*, 202 Mich App 706, 712; 510 NW2d 198 (1993), *rev'd on other grounds* 448 Mich 1 (1995); *People v Flowers*, 191 Mich App 169, 176-177; 477 NW2d 473 (1991). The element of malice necessary to support a second-degree murder charge may be established in three different ways. Specifically, the

prosecution must show: (1) an intent to kill, (2) an intent to do great bodily harm, or (3) the wanton and willful disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm. *Goecke, supra* at 464; *People v Barrera*, 451 Mich 261, 288, n 20; 547 NW2d 280 (1996), *cert den* 136 L Ed 2d 246 (1996).

The elements of statutory manslaughter are:

(1) The defendant caused the death of the victim.
(2) The death resulted from the discharge of a firearm.
(3) When the firearm went off the defendant was pointing the firearm.
(4) Defendant intended to point the firearm.
(5) Defendant caused the death without lawful excuse of justification.
[*Heflin*, at 497 citing *People v Doss*, 406 Mich 90, 98, n3; 276 NW2d 9 (1979). CJI2d 16.11].

The elements of Second Degree Murder are as follows:

(1) A death
(2) Caused by an act of the Defendant.
(3) Defendant had one of these three states of mind:
   (a) Defendant intended to kill, or
   (b) Defendant intended to do great bodily harm, or
   (c) Defendant knowingly created a very high risk of death or great bodily harm knowing that death or such harm would be the likely result of his actions.
   CJI2d 16.5; Goecke, Supra, at 464.

The People argued at trial that the Defendant intended to kill Ashleigh Moomaw or that he at least knowingly created a very high risk of death or great bodily harm knowing that death or such harm would be the likely result of his actions. Defendant maintained a defense of accident (T of 2-18-04) or that he was merely "grossly negligent." This level of negligence is consistent with the necessary mens rea of common law manslaughter. The elements of common law involuntary manslaughter are a death, caused by an act of the defendant, with gross negligence; that is, with wanton and willful disregard of the possibility that his conduct will

cause death or great bodily harm. *People v Djordevic*, 230 Mich App 459, 462; 584 NW2d 9 (1988).

Statutory manslaughter requires proof not required for second-degree murder, specifically, that defendant used a firearm, and intentionally pointed it at the victim. Just as felonious assault is not an included offense of assault with intent to murder because it requires proof of the use of a dangerous weapon, an element not required by assault murder, it is an analysis of the elements and the mental state that both must be analyzed. Statutory manslaughter is not a necessarily included offense of second-degree murder because it is possible to commit the crime of second-degree murder without first committing the crime of statutory manslaughter. (Murder does not require the use of a gun). See *People v Bearss*, 463 Mich 623, 627; 625 NW2d 10 (2001); *People v Veling*, 443 Mich 23, 36; 504 NW2d 456 (1993) (Difference between necessarily included offenses and cognate offenses is that for necessarily included offenses, it is impossible to commit the greater without first committing the lesser). See also *People v Ora Jones*, 395 Mich 379, 387; 236 NW2d 461 (1975), overruled by *Cornell, Supra*, [citing 4 Wharton, Criminal Law & Procedure (12^{th} ed) § 1799] (common law definition of lesser-included offenses was that the lesser must be such that it is impossible to commit the greater without first committing the lesser).

Judge Sosnick properly instructed the jury on the necessarily lesser-included offense of manslaughter, following the mandates of *Cornell* and *Mendoza*, while properly declining to instruct the jury on statutory manslaughter.

For the reasons stated above, the decision of the Court of Appeals in this matter is clearly erroneous and will cause material injustice, and conflicts with a prior decision of this Court

Heflin, Supra at 497 (1990), and decision of the Court of Appeals, [*People v Antonio D. Ware*[5], No. 247142 (Decided June 29, 2004)]. MCR 7.302(B)(5). Also see *People v Gale Fishell*, No. 230878 n6 (Decided April 2003) *lv den* 469 Mich 981 (2003) where a panel of the Court of Appeals noted that, "We cannot say that the charge of murder includes the charge of statutory involuntary manslaughter." (Copy of Opinion attached as Appendix E).

The Court of Appeals, and defendant assert that the test is whether a rationale view of the evidence supports the charge. This is the definition of a cognate offense and not a necessarily included offense. To be a lesser-included offense the inferior offense elements must be subsumed in the elements of the greater offense. This requires a comparison of the elements of the offense in the abstract apart from the facts of the case to determine if the lesser elements are all within the elements of the greater. Only when the elements of the lesser are subsumed in the greater is it necessary for the court to look to the facts of the case to see if an instruction is warranted. If one starts with an examination of the facts of the case, then there is no need to determine if the elements of the lesser are a subset of the greater. The test will now be whether the facts support the inferior offense not whether the legislature intended to have the instruction given or not under MCL 768.32.

Statutory manslaughter requires the use of a firearm that is not required to commit either murder of common law manslaughter. Only when one ignores the test of *Cornell, Supra*, and looks only at the facts, without a comparison of the elements can statutory manslaughter be considered a lesser-included offense of murder.

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[5] One Court of Appeals Judge was a member of both the *Ware* panel and the *Smith* panel that reached opposite results on the same issue. (Copy of *Ware* attached as Appendix D)

II. RETREATING FROM THE ELEMENTAL TEST OF CORNELL AND APPLYING A FACT DRIVEN TEST, THE DECISION NOT TO INSTRUCT ON STATUTORY MANSLAUGHTER WAS HARMLESS. THE JURY REJECTED THE INTERMEDIATE OFFENSE OF COMMON LAW MANSLAUGHTER, FINDING DEFENDANT GUILTY OF SECOND-DEGREE MURDER.

Standard of Review

The trial court is only required to instruct a jury on necessarily lesser-included offenses, and not cognate offenses. Moreover, the requested lesser included offense is proper if the charged offense requires the jury to find a disputed factual element that is not part of the lesser included offense and a rational view of the evidence would support giving the instruction. The decision on whether to instruct is reviewed for clear error. *Cornell*, *Supra*, at 357. The defendant did preserve this issue by requesting a jury instruction on MCL 750.329 a cognate offense in the trial court.

Analysis

Even if it was error to fail to instruct on statutory involuntary manslaughter, the error was harmless since the jury was instructed on common-law manslaughter and rejected that lesser intermediate offense. Under MCL 769.26, no verdict shall be reversed or a new trial granted on the ground of misdirection of the jury unless in the opinion of the court, after an examination of the entire cause, it shall affirmatively appear the error complained of has resulted in a miscarriage of justice. This Court has made it clear that harmless error analysis is to be applied to claims of instructional error involving necessarily included offenses. "If other lesser instructions had been given and been rejected by the jury, consideration of the "entire cause" would likely lead us to conclude that the error did not undermine the reliability of the verdict." *Cornell,*

Supra, at 365 n6. In this case, it is more probable than not[6] that the jury which rejected common-law manslaughter and its lesser mental state of gross negligence in favor of the malice required for second-degree murder would have now rejected the malice and found statutory manslaughter without any malice.

Recently, this Court decided the matter of *People v Hawthorne*, 474 M 174;____NW2d____(2006), and applied the harmless error analysis of *People v Lukity*, 460 Mich 484; 596 NW2d 607 (1999). Defendant has the burden of proof to demonstrate that the preserved nonconstitutional error resulted in a miscarriage of justice. This means that defendant must demonstrate that it is more probable than not that the error was outcome determinative. An error is "outcome determinative" if it undermines the reliability of the verdict.

At trial, there was no dispute that defendant pointed a gun at the victim's head, and then shot the victim in the head. The shot caused the victim's death. Pointing a gun at someone's head, and pulling the trigger allows a jury to find beyond a reasonable doubt that the victim's death was caused by defendant, who acted with the necessary malice. In this matter malice is defined as the "intent to kill, the intent to cause great bodily harm, or the intent to do an act in wanton and willful disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm." *Goecke, Supra* at 464. Malice is properly inferred from evidence that defendant intentionally set in motion a force likely to cause death or great bodily harm. *Djordjevic*, *Supra.* at 462.

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[6] In cases of non-constitutional preserved error, defendant must show that it is more probable than not that the failure to give the requested lesser-included instruction undermined the reliability in the verdict. *People v Carines*, 460 Mich 750; 597 NW2d 130 (1999).

The People proved that defendant had the intent to do an act that is in obvious disregard of life-endangering consequences. *People v Aldrich* 246 Mich App 101, 123 631 NW2d 67 (2001). The jury properly rejected defendant's claim that his action was merely grossly negligent, finding the malice for second-degree murder. The jury's rejection of gross negligence precludes an appellate court from finding that it is more probable than not that the jury would have found no malice necessary for a conviction of statutory manslaughter.

In *People v Beach*, 429 Mich 450; 418 W2d 861 (1988) this Court employed a harmless error analysis where the trial court did not give a requested instruction on a cognate offense. The Court found that the trial court's failure to instruct the jury on the cognate offense of conspiracy to commit larceny in a building was error. The error was harmless where the jury rejected the lesser-included offense of unarmed robbery and convicted defendant on the greater charge of conspiracy to commit armed robbery. This Court noted that the harmless error doctrine applied in *Beach* did

> not create an unacceptable erosion of the ability of a defendant to have a jury consider lesser included offenses. Instead it preserves a conviction in spite of a harmless mistake, provided the jury had another lesser offense to consider." *Beach, Supra*, at 493.
>
> Harmless error analysis under these circumstances, effectuates a balance of justice; that is, a weighing of the conviction by the jury against judicially generated theories of possible harm to a defendant. Because the doctrine is limited to situations where the jury had the choice of a lesser offense and rejected it in favor of conviction of a higher offense, we believe the balance is just.
> *Beach, supra,* at 493.

In *People v Mosko*, 441 Mich 496; 495 NW2d 554 (1992) this Court affirmed the first degree criminal sexual conviction of defendant where the trial court had failed to instruct the jury on the necessarily included offense of third degree criminal sexual conduct. The Court extended

the harmless error analysis too necessarily lesser-included offenses. Determining that appellate court should not set aside the judgment of a trial court without first engaging in a harmless analysis. Where a defendant is convicted of a greater charge and the jury is instructed on a lesser charge, which is rejected by the jury, any error in not instructing on a still lesser charge is harmless. The rejection of the intermediate lesser offense by the jury would demonstrate that the jury would have rejected the still lesser requested charge of statutory manslaughter. As this Court stated in *People v Gillis* 474 Mich 105,140, n18; 712 NW2d 419 (2006), "Given the jury's refusal to either acquit of convict of the lesser offense, defendant has failed to demonstrate that a "miscarriage of justice" occurred when the trial court failed to instruct on involuntary manslaughter."

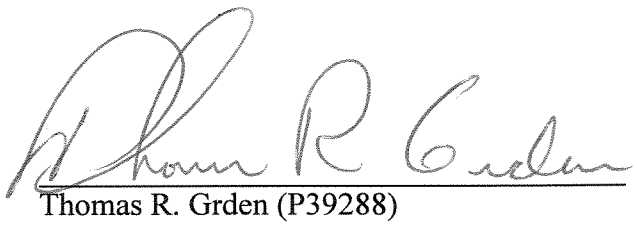
RELIEF

WHEREFORE, David G. Gorcyca, Prosecuting Attorney in and for the County of Oakland, by Thomas R. Grden, Assistant Prosecuting Attorney, respectfully requests that this Honorable Court grant leave to appeal, or in the alternative, reverse the decision of the Court of Appeals and reinstate the jury's verdict of second degree murder from the Oakland County Circuit Court.

Respectfully Submitted,

DAVID G. GORCYCA
PROSECUTING ATTORNEY
OAKLAND COUNTY

JOYCE F. TODD
CHIEF, APPELLATE DIVISION

By: 
Thomas R. Grden (P39288)
Assistant Prosecuting Attorney

DATED: May 17, 2006